No. 91-342

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

MAHINDER S. UBEROI,
*Petitioner,*

v.

BOARD OF REGENTS of the UNIVERSITY
of COLORADO
*Respondent.*

On Petition for Writ of Certiorari to
Colorado Court of Appeals

## REPLY TO BRIEF IN OPPOSITION

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December 19, 1991

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## *PETITIONER'S REPLY TO BRIEF IN OPPOSITION*

### *I.*

***The plain terms of the injunction of the District Court of Boulder County, Colorado bars Petitioner from proceeding pro se* in a defensive posture, and that is precisely what has happened in a case.**

Respondent argues that the lower court has not enjoined petitioner from representing himself in a defensive posture (Resp. Br. 5-7). However, the plain terms of the injunction are that petitioner is enjoined from "filing any paper work of any nature in any current or future pending case" and "from representing himself in any manner in XX Judicial district." Petition at a1-a3.

Moreover, another court in the judicial district where the injunction applies, has ruled that petitioner may *not* represent himself when respondent seeks an award of attorney's fees against him. *Uberoi v. University of Colorado Board of Regents, et al.*, No. 85 CV 2080, Dist. Ct., Boulder Cty, Colo., Div. 2. Specifically, respondent moved for an award of attorney's fees and the court scheduled a hearing. Thereafter, petitioner moved that he be allowed to defend himself against an award of fees, arguing that the Fourteenth Amendment's prohibition against deprivation of property without due process required that he be allowed to represent himself against the University's effort to obtain a money judgment against him. The court ruled that petitioner must retain a licensed attorney if he wanted to be heard at the fees hearing and resolved petitioner's motion for *pro se* representation by scrawling "motion denied" on the motion. *See* a facsimile of this order in the appendix hereto.

Therefore, there can be no question that the injunction at issue here prohibits petitioner from representing himself, not only as a proponent of a claim, but defensively as well. That prohibition violates petitioner's rights of access to the courts and due process and, therefore, warrants review by this Court.

## II.

**The injunction prevents meaningful access to the courts.**

Respondent claims that the Colorado court's injunction does not prevent petitioner's meaningful access to the courts, and then reviews the methods used by various courts to curb litigation abuse (Resp. Br. 7-10). What respondent does not mention, however, is that, with the exception of the Colorado state courts and two other federal district court cases from Colorado, decided by the same district judge, one involving this petitioner, *see People v. Carter*, 678 F. Supp. 1484 (D. Colo. 1986); *University of Colorado v. Uberoi*, No. 88-F-1323 (D. Colo. Sept. 25, 1989), *aff'd*, Nos. 89-1117, 89-1304, 89-1337 (10th Cir. May 25, 1990), *no court* has enjoined any litigant, indigent or not, from all *pro se* litigation in perpetuity. But that is precisely what the lower courts have done here.

Assuming, *arguendo*, that petitioner abused the litigation process;[1] As respondent itself has noted (Resp. Br.

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[1] Petitioner has brought only four lawsuits against respondent, each of which advanced public interest, at least in some respects, e.g.: Case 1: *Uberoi v. Univ. of Colo.*, 686 P.2d 785 (Colo. 1984), with two justices listening, held that Colorado Open Records Act does not apply to the University. Within weeks, the legislature amended the statute to encompass the University. Case 2: *Uberoi v. Univ. of Colo.*, 713 P.2d 894 (Colo. 1986) held that officials of the University sued in their individual capacities and the university itself are "persons" under 42 U.S.C. §1983 and

8-9), most courts have used other methods, primarily pre-filing screening, to deal with litigation abuse by *pro se* litigants. Since the lower courts have here never even attempted any such less restrictive methods, it raises the question whether the injunction violates petitioner's right of access to the courts. This is so not only because of this Court's precedents in the access to the courts area, *see, e.g., Bounds v. Smith*, 430 U.S. 817 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969), but also because the right of self-representation is one of constitutional dimension that may be infringed only in the most circumspect manner. *See* Br. of *Amicus Curiae* Public Citizen, at 6-7. Since the approach to litigation abuse taken by the Colorado courts differs vastly from that taken by most other courts, including most of the circuit courts of appeals, *see, e.g., In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984), this Court should grant review to provide guidance and to clarify this area of law.

## III.

**No "unique circumstances" justify the lower court's injunction**

Respondent argues that "unique circumstances" justify the lower court's decision to bar petitioner, in perpetuity, from representing himself in the Twentieth Judicial District of Colorado, where he resides (Resp. Br. 10-12).

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reinstated petitioner's civil rights claims against them. Case 3: *Uberoi v. Univ. of Colo. et al.*, 82 M/LW 806 (D. Colo. 1982). After a day-long hearing, court ruled there was sufficient evidence of respondent's fraud against U.S. Govt. and petitioner may pursue his action under Federal False Claims Act. Case 4: *Uberoi v. Univ. of Colo., et al.*, 85 CV 2080, Boulder County Dist. Ct. Colo. ordered respondent to disclose public records to petitioner which were illegally concealed.

Resp. Br. Appendix 1 gives *partial* transcript of the hearing at which the injunction was issued. But it fails to include the following *crucial* part.

> THE COURT: [A]t the last tally he had something like $110-$115,000 in attorney's fees assessed against him on the basis of frivolous and groundless actions. [Transcripts p. 78, l. 18]
>
> MS. FULTON: No, your honor, I just would like to agree with Dr. Uberoi that he has one case [*Uberoi v. Univ. of Colo. et al.*, 82 M/LW 806 (U.S. Dist. Ct., Colo. 1982)] that the Court included in the ruling, which accounts for $75,000 of the slightly more than $100,000 in attorney fees. The judgment was not--the attorney fees were not granted on the finding of frivolous and groundless. They were granted to us as a prevailing party after the case was dismissed for Dr. Uberoi's failure to require [comply] with discovery notice. Other than that I have nothing more to say.
>
> THE COURT: All right. Thank you for that correction. [Transcript, p. 80, l.11]

Respondent confessed at trial that 82 M/LW was *not* frivolous.

In that case, petitioner alleged that respondent defrauded his and other research grants from U.S. Govt. and violated his civil rights because of his Asian Indian Origin. The docket sheet for 82 M/LW 806 was admitted into evidence at the trial and shows that the court thrice ordered petitioner to prepare pretrial order and compelled him to prepare one even though respondent had not even answered the complaint.

Petitioner specifically requested a ruling whether petitioner, not a licensed attorney, may pursue *pro se* the *qui tam* action under Federal False Claims Act considering that respondent had defrauded him and the government.

After 3 years, Judge West held all-day hearing and ruled that there was sufficient evidence of fraud and petitioner may proceed *pro se*. He later granted summary judgment for respondent since petitioner may not pursue the *qui tam* claim without a licensed attorney, and he refused to separate the claim, relate it back to 1982 and permit a licensed attorney to enter an appearance on petitioner's behalf in the separated claim.

He set discovery deadline even before respondent had answered the complaint and dismissed the civil rights claims for failure to complete discovery. He awarded respondent its attorney fees which were mainly for its defense of action under False Claims Act which mandates that an informer with meritorious claims, as petitioner's, should be rewarded.

Moreover, respondent was not entitled to attorney fees for its defense of civil rights claims since they were *not* frivolous. *Davis v. City of Charleston, MO.*, 827 F.2d 317 (8th Cir. 1987).

Resp. Br. at B1-B13 shows that *Bd. of Regents of the Univ. of Colo. v. Uberoi*, 88 F 1325 (D. Colo. 1988) sought to permanently enjoin petitioner from appearing *pro se* in U.S. Dist. Ct. for Dist. of Colo. because he had filed a frivolous action, 82 M/LW 806, in the district.

In the very early stages of the case, respondent gave honorary degree of doctor of laws to trial judge Sherman G. Finesilver. President of the University at his house entertained the judge for lunch. He and his six relatives were entertained at cocktails and buffet in the evening. A

professional photographer photographed them and the award of the honorary degree. Respondent gave the judge eleven (11) large color photographs, showing different poses of the judge, his relatives, and the ceremony, as gifts.

The judge wrote to the President that, "I shall endeavor within my power...to continue to contribute to the good name of our University."

Respondent gave Judge Finesilver "things of value" and in return he vowed to advance its good name, i.e., to favor it in the case before him. It violated 18 U.S.C. §201, Bribery of public officials.

Petitioner further discovered that in 1980, a joint committee of Regents and faculty of the University had rejected Judge Finesilver's application for the honorary degree.

82 M/LW 806 was assigned to Judge Richard P. Matsch. After more than three years, he ruled that he and all other district judges of District of Colorado were disqualified since one of the defendants, Jim Carrigan, is now a judge of the court, although he is sued for his conduct before he became a judge. And Chief District Judge Finesilver should seek assignment of another judge, from outside the District of Colorado, to the case in *accordance with established procedure.*

Judge Finesilver selected Judge Lee R. West of Western District of Oklahoma to handle the case and told Chief Judge of the Tenth Circuit to make the designation required under 28 U.S.C. §292(b) and the latter obliged. Judge Finesilver violated several provisions of law and *established procedure.*

(1) He usurped the authority of Chief Circuit Judge who has exclusive jurisdiction to make intracircuit assignments of district judges under §292(b).

(2) Since he was disqualified to try the case under 28 U.S.C. §455(a) he was also disqualified to select another judge to try the case. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261 (5th Cir. 1983).

(3) *Guide to Judiciary Policies and Procedure,* Vol. III, Ch. XIV specifically states:

> To avoid the appearance of impropriety or conflict of interest, judges of the borrowing circuit, once disqualified, should not participate in the selection of the visiting judge or judges.
>
> The same rationale and procedure applies to intracircuit assignments.

The designation and the correspondence showing that Judge Finesilver had selected Judge West to handle *Uberoi v. Univ. of Colo., supra*, was filed, and docket sheet of the case shows that copies of them were not mailed to petitioner, in violation of Fed. R. Civ. P. 77, in order to prevent the petitioner from discovering the illegal assignment of the case to Judge West.

Petitioner has no confidence that respondent's case *Bd. of Regents of the Univ. of Colo. v. Uberoi*, 88 F 1323 (D.Colo.) was not funneled to Judge Finesilver.

**Trial judge proceeded in willful violation of order disqualifying him**

Upon discovering that *Uberoi v. Univ. of Colo. et al.*, 82 M/LW 806 (D.Colo.) was assigned to Judge West in

violation of 28 U.S.C. §455(a), petitioner in *Bd. of Regents of the Univ. of Colo. v. Uberoi*, 88 F 1323 (D. Colo.) filed motion for vacatur in 82 M/LW 806 under Rule 60(b)(6) citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). He also filed motion to disqualify Judge Finesilver from resolving the motion for vacatur. Petitioner stated that Judge Finesilver was required to follow Judge Matsch's order disqualifying all judges of the district, including Finesilver, from trying any aspect of 82 M/LW 806.

Judge Finesilver instantly resolved the motions with one word "DENIED."

The allegations in Rule 60(b)(6) motion should be considered as allegations in an independent action and must be taken as true when denying the motion or dismissing the action. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Martin v. King*, 417 F.2d 458, 461 (10th Cir. 1986).

**Tenth circuit judge who wrote the opinion was disqualified**

Opposition brief in Appendix 3 cites order and judgement in *Bd. of Regents of the Univ. of Colo. v. Uberoi*, (10th Cir. Nos. 89-1117, 89-1304, 89-1337) written by John P. Moore. The consolidated case appealed the injunction, dismissal of petitioner's counterclaims *and* dismissal of Rule 60(b)(6) motion to vacate the judgment in *Uberoi v. Univ. of Colo. et al.*, 82 M/LW 806 in which district Judge Jim Carrigan is a defendant for his conduct before becoming a judge. Moore had recently served with Carrigan as a district judge in District of Colorado, before Moore was appointed a circuit judge.

Judge Moore was clearly disqualified under 28 U.S.C. §455(a) for appearance of partiality. He avoided this by ignoring the appeal of the denial of Rule 60 motion.

On petition for rehearing, Judge Moore ruled that he inadvertently overlooked the appeal of denial of the Rule 60 motion even though petitioner's appellate brief was largely devoted to it. He ruled that it was harmless error when disqualified Dist. Judge Finesilver handled the Rule 60 motion and denied it, because there was not basis for it since disqualified Judge Finesilver "merely determined the availability of Judge West and reported it to [Chief Circuit] Judge Holloway in accordance with regular system of reassignment."

In fact, disqualified Judge Finesilver *selected* Judge West to handle 82 M/LW 806 and *told* Judge Holloway to make the designation required under 28 U.S.C. §292(b). Judge Holloway responded that he does not need to do anything since a *previous* designation of Judge West to serve in District of Colorado in *another* matter refers to cases and adequately covers 82 M/LW 806 as well.

Moreover the *absolute rule* is that a disqualified judge's decisions are null and void whether or not he otherwise committed any other reversible error.

Tenth Cir. Rule 34.1.8(c) states:

> Oral argument will be allowed in all cases unless a panel of three judges, after examination of the briefs and the records, shall be unanimously of the opinion that oral argument is not needed.

Petitioner was not allowed oral argument and neither in Order and Judgment nor in the Order on Rehearing is there the determination required under the rule that oral argument is not needed.

**Injunction shields Respondent's continued fraud in courts**

*Uberoi v. Univ. of Colo. Bd. of Regents, et al.*, Boulder County, Colo. No. 83 CV 625, Div. 5 awarded respondent its costs. It fraudulently garnished petitioner's wages for cost of petitioner's deposition when he was never deposed. Petitioner moved to sanction respondent. The court denied the motion because the injunction prohibits petitioner from filing any paper.

Respondent did not deny its misconduct but moved the court to "impose a fine upon Plaintiff Uberoi of not less that $50,000 and sentence him to imprisonment for a term not less than six months" for violation of the injunction.

"Unique circumstances" are that respondent defrauded U.S. Govt. and petitioner, violated his civil rights, filed fraudulent affidavits in courts, illegally influenced trial judge and got attorney's fees for its defense of such conduct, continues to retaliate against petitioner by prohibiting him from doing any teaching or research in spite of his tenured professorship and has succeeded in enjoining him from seeking any relief from respondent's continuing illegal and immoral conduct.

WHEREFORE, petition for certiorari should be granted.

Respectfully submitted,

Mahinder S. Uberoi, *pro se*

FILED 20TH JUDICIAL DIST.
FOR AUG 15 P 4:13
BOULDER COUNTY, COLORADO

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 85 CV 2080-2

MAHINDER S. UBEROI,

Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, et al.,

Defendants

MOTION TO PERMIT UBEROI TO FULLY REPRESENT HIMSELF IN PROCEEDINGS TO TAX ATTORNEY FEES AND COSTS AGAINST HIM.

1. The Court has entered final judgment on the merits which is appealable regardless of any unresolved issue of attorney fees. Baldwin v. Bright Mortgage Co., 757 P.2d 1072 (Colo. 1988). The judgment has been appealed to Colorado Supreme Court, Case No. 89 SA 228. The proceedings to tax attorney fees and costs against Uberoi are separate proceedings in which he is appearing in a defensive position. Notwithstanding any orders of Judge Roxanne Bailin and/or Morris W. Sandstead, Jr. the Court lacks jurisdiction to prevent Uberoi from appearing pro se in a defensive position relating to claims against him for costs and attorneys' fees since it would violate U.S. Const. Amend. V, No person shall be . . . deprived of life, liberty and property, without due process, Amend. XIV. No state shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of law; it would also violate Colo. Const. Art. II. No person shall be deprived of life, liberty or property without due process of law.

2. In Board of County Commissioners of the County of Boulder v. Barday, 594 P.2d 1057, (Colo. 1979), the Supreme Court enjoined a person from appearing as a pro se plaintiff in suits relating to his marital difficulties. The Court specifically held that:

> [he] is still free to appear pro se in his own defense. Thus, this injunction works no infringement on respondent's constitutional rights. [Emphasis in the original, at 1059].

3. In Shotkin et al., v. Kaplan et al., 180 P.2d 1021 (Colo. 194), the Supreme Court enjoined Shotkin from appearing as a pro se plaintiff. The court specifically held that:

> There is not involved here the right of a party to represent himself when made defendant or defendant in error. At 1022.

Motion denied, 8-16-89 Morris Sandstead

4. The Court should consider this motion as an emergency application and immediately enter a ruling so that, if necessary, Plaintiff may seek relief from Colorado Supreme Court.

5. A copy of this motion is being served on Clerk of Division 2 so that it is brought to Judge Morris W. Sandstead Jr.'s attention as an emergency application. Exhibit A.

WHEREFORE, Plaintiff prays that the Court grant permission to Uberoi to fully represent himself in proceedings to tax costs and attorney fees against him and that the court provide such further and additional relief it deems just and proper.

Dated: August 15, 1989

Respectfully submitted,

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